APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JANUARY 29, 1999

INTERSTATE BRANDS CORPORATION,
Plaintiff-Appellant,

v.

BAKERY DRIVERS & BAKERY GOODS VENDING MACHINES, LOCAL UNION NO. 550,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Defendant-Appellee.

Docket No. 98-7194

United States Court of Appeals,
Second Circuit.

Argued Oct. 29, 1998.

Decided January 29, 1999

* * *

Before: FEINBERG, VAN GRAAFEILAND, and LEVAL, Circuit Judges.

FEINBERG, Circuit Judge:

Plaintiff Interstate Brands Corporation (IBC) appeals from the grant of summary judgment in the United States District Court for the Eastern District of New York, Sterling

Appendix A

Johnson, Jr., J., in favor of defendant Bakery Drivers & Bakery Goods Vending Machines Local Union 550, International Brotherhood of Teamsters (the Union) on IBC's action, filed pursuant to Section 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187, to recover damages from the Union's strike, an alleged illegal secondary boycott in violation of Section 8(b)(4)(i)-(ii)(B) and 8(b)(4)(i)-(ii)(D) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 158(b)(4)(i)-(ii)(B) and 158(b)(4)(i)-(ii)(d). In a thorough opinion, the district court dismissed the suit on the ground that the parties' collective bargaining agreement (the Agreement) requires that the dispute be heard by an arbitrator. See Interstate Brands Corp. v. Bakery Drivers & Bakery Goods Vending Machines Local 550, 1998 WL 19974 (E.D.N.Y. Jan.20, 1998). For the reasons stated below, we affirm.

I. Background

According to the record before us, IBC is a Delaware corporation engaged in the production, marketing and distribution of cake and bakery products in various regions of the United States. For many years, IBC has distributed Dolly Madison cake products in the New York metropolitan area through three non-union firms independently owned and operated by Sam Jacobson (the Jacobson companies). In July 1995, IBC acquired the Continental Baking Company (CBC), which sold and distributed Hostess Cake and Wonder Bread products in the New York metropolitan area. As a result, IBC became the employer of CBC's Route Salespersons and assumed the terms and conditions of the Agreement entered into by the Union, which represents

Route Salespersons, and CBC for the period from March 1994 to March 1997.

Article VI of the Agreement contains an unusually broad arbitration clause that requires the parties to arbitrate

> all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this Agreement, or any act or conduct or relation between the parties hereto, directly or indirectly.

Article XXII of the Agreement, reproduced in full in the Appendix, excludes from arbitration certain disputes over the employer's distribution policies. Article XXII(A) provides that in view of

> changes that have occurred in retail food stores, i.e., the rapid disappearance of small individual stores and their replacement at an accelerated rate by the large corporate and cooperative food chains . . . it may be necessary to recognize the appropriateness of considering changes in delivery, merchandising and compensation methods.

Under Article XXII(A), the employer (now IBC) may request a meeting with the Union during the term of the Agreement "for the purpose of negotiating and mutually agreeing on different commission payments or other methods of compensation or delivery methods which may

be desirable under such changed conditions." Further, "in the event of such request, the parties will meet promptly for the purposes outlined above." Article XXII(B) provides that "[i]n the event the parties are unable to agree, the dispute shall not be subject to arbitration." Finally, Article XXII(C) provides that

> Other provisions of the contract notwithstanding, the parties recognize that the employer may decide to change its distribution methods during the term of this agreement only. Accordingly, it is understood that the employer has the right to reopen the contract during the contract term for the sole purpose of negotiating the effects of such changed distribution. In such reopener, the parties will meet and bargain in good faith to resolve differences, if any. If the parties fail to reach agreement and the employer implements such distribution changes the Union shall have the right to strike and the employer shall have the right to lock out over the distribution change issues.

The Agreement's validity is undisputed.

Shortly after IBC's acquisition of CBC, Richard Volpe (Volpe), the Union's Executive Officer, claimed that IBC's long-standing practice of distributing Dolly Madison cake products through the Jacobson companies was a "change" in distribution policy that triggered Article XXII of the Agreement. The Union's position was that, because of IBC's acquisition of CBC and assumption of CBC's obligations

under the Agreement, Union members were entitled to distribute Dolly Madison products in addition to Hostess Cake and Wonder Bread. Despite the Union's claim, IBC continued to distribute Dolly Madison products through the Jacobson companies. Volpe, in turn, sent letters to IBC in August 1995 and February 1996 threatening a strike under Article XXII(C).

On September 9, 1996, the Union struck IBC's Hostess Cake operation. IBC responded by filing an unfair labor practice charge with the National Labor Relations Board ("NLRB"), alleging an illegal secondary boycott in violation of Section 8(b)(4) of the NLRA. The Union reached a settlement with the NLRB on September 11, 1996 pursuant to which it agreed to end the strike. Rather than returning to work the next day, however, the Union expanded the strike to include IBC's Wonder Bread operation. The strike ended on September 13, 1996. According to IBC's complaint in the district court, the Union called the strike in order to pressure IBC to stop distributing Dolly Madison products through the Jacobson companies and, instead, assign that business to Union members.

IBC filed this suit under Section 303 of the LMRA for damages caused by the Union's allegedly unlawful secondary activity. IBC now appeals from the district court's decision that the Agreement requires arbitration of this claim.

II. Discussion

We review the district court's ruling on arbitrability de novo. See Collins & Aikman Products Co. v. Building

System, 58 F.3d 16, 19 (2d Cir.1995). This appeal presents three principal issues: (1) whether Article VI of the Agreement covers IBC's claim for damages under LMRA § 303; (2) whether that claim comes within the scope of the exception to arbitration contained in Article XXII; and (3) whether this court's decision in Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Local 584, 359 F.2d 598 (2d Cir.), cert. denied, 385 U.S. 832, 87 S.Ct. 71, 17 L.Ed.2d 67 (1966), precludes the arbitration of IBC's claim. In addition, IBC argues that summary judgment was improper because there were genuine issues of material fact that still had to be decided in the district court.

A. The Scope of the Article VI Arbitration Clause

The Supreme Court made clear almost 40 years ago in the Steelworkers Trilogy that there is a strong federal policy favoring the arbitrability of labor disputes. See United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68, 80 S.Ct. 1363, 4 L.Ed.2d 1432 (1960). Normally, the inclusion of an arbitration clause in a collective bargaining agreement creates a "presumption of arbitrability" as to disputes that arise between the parties to that agreement. See AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). This presumption "is particularly applicable," id., when the arbitration clause is broad, as it is here.

However, IBC contends the Supreme Court's recent decision in Wright v. Universal Maritime Svc. Corp., __ U.S. __, 119 S.Ct. 391, 142 L.Ed.2d 361 (1998), decided after this appeal was argued, makes the presumption of arbitrability inapplicable. In Wright, the Court held that a longshoreman was not barred from suing his employer under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., despite a general arbitration clause in the collective bargaining agreement (CBA) negotiated between his employer and his union. The Court held that the presumption of arbitrability in this context "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a CBA." Id. at __, 119 S.Ct. at 395. Where a dispute "ultimately concerns not the application or interpretation of any CBA, but the meaning of a federal statute", id. at __, 119 S.Ct. at 396, the presumption does not apply. Instead, Wright requires a court to determine whether, without use of the presumption, an "ordinary textual analysis of a CBA show[s] that matters which go beyond the interpretation and application of contract terms are subject to arbitration." Id.

The Wright Court also stated that where the matter beyond the interpretation and application of contract terms is the union-negotiated waiver of an employee's statutory right to a judicial forum, the waiver will be given effect only if it is "clear and unmistakable." Id. at __-__, 119 S.Ct. at 395-96. The Court went on to state, however, that where the matter involves an individual employee's waiver of his or her own rights through an individually, as opposed to collectively, bargained employment contract, this "clear and

unmistakable" standard is not applicable. See id.; see also, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (holding that arbitration clause covering "any dispute, claim or controversy" required arbitration of claim brought under Age Discrimination in Employment Act by individual employee in securities industry). Wright does not provide express guidance on whether the "clear and unmistakable" standard applies where the statutory right at issue belongs to the employer, as it does here. However, the underlying rationale of the decision leads us to conclude that on this record it does not.

Wright's "clear and unmistakable" standard is based upon a concern about allowing a union to waive an individual employee's statutory rights — i.e., a concern about the waiver of one's rights by someone else. Where, however, one waives one's own rights, the "clear and unmistakable" standard is not required. We thus see no reason why an employer that, like IBC, has individually negotiated a CBA with a union[1] should be held to have waived its statutory rights only if the waiver was "clear and unmistakable." Such an employer has negotiated on behalf of itself.

Thus, it seems appropriate for us to infer from Article VI of the Agreement that IBC has waived its right to a judicial forum for the vindication of its federal statutory

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1. On the record before us, it appears that the Agreement here was negotiated individually by CBC with the Union. IBC assumed the obligations of the Agreement and clearly has no greater right under it than CBC.

claim. Article VI requires a party to arbitrate "any act or conduct or relation between the parties hereto, directly or indirectly." As noted earlier, this language is unusually broad. The district court recognized that the arbitration provision is quite similar to one our court deemed "very broad" in Associated Brick Mason Contractors v. Harrington, 820 F.2d 31, 35 (2d Cir.1987). Indeed, the two clauses are almost identical. See id. at 36. Such language "could hardly be broader," id., and is reasonably read to reach matters that go beyond the application and interpretation of the Agreement. Furthermore, this result is compelled as a matter of contract construction, without the use of any presumption. IBC agreed to arbitrate any dispute "involving questions of interpretation or application of any clause or matter covered by [the] Agreement, or any act or conduct or relation between the parties [t]hereto, directly or indirectly." (emphasis supplied). "[A]ny act or conduct or relation between the parties" must necessarily mean something other than "questions of interpretation or application of any clause or matter covered by [the] Agreement," for to hold otherwise would render this language mere surplusage. See Rothenberg v. Lincoln Farm Camp, Inc., 755 F.2d 1017, 1019 (2d Cir.1985), where we stated that an interpretation "that gives a reasonable and effective meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect."

Thus, we hold that IBC's LMRA § 303 claim comes within the scope of the arbitration clause in Article VI.

B. The Article XXII Arbitration Exclusion Provision

We next turn to whether IBC's claim comes within Article XXII's exclusion from arbitration of certain distribution disputes. IBC contends that because the Union's 1996 strike was called to protest IBC's non-Union distribution of Dolly Madison products, a suit for damages caused by that strike is a "dispute" over distribution policy that "shall not be subject to arbitration." The Union argues, and the district court agreed, that the word "dispute" in this context has a far narrower scope. According to the Union, the only "dispute" excluded from arbitration is a dispute over what IBC's methods of distribution shall be — that is, the parties may not resolve their differences over distribution methods by resorting to "interest arbitration," in which an arbitrator would decide whether IBC may implement its proposed change(s).[2] Instead, the Union argues, Article XXII(C) allows the parties to use a strike or lockout — one of only three exceptions to the Agreement's no- strike/no-lockout clause — to "negotiate" changes in this fundamental work issue.[3]

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2. See 5 Labor Law § 21.08 (Theodore Kheel ed., 1998) (" 'Interest arbitration' is the arbitration of new contract terms, usually resorted to when the parties are unable to agree on the terms of a new, renewed, or reopened contract").

3. The other two exceptions to the no-strike/no-lockout clause are (1) when one of the parties to the Agreement fails to abide by the decision of an arbitrator; and (2) when IBC fails to make required contributions to the Union's Health Benefits Fund or Pension Fund.

IBC's claim that a suit for damages caused by an illegal strike over distribution issues is a "dispute" under Article XXII(B) is not the logical meaning of that provision. As the district court observed:

> Here, Plaintiff's claim is not the type of dispute contemplated in Article XXII(B). First and foremost, Plaintiff's claim is not directly related to a change in distribution policies. Plaintiff did not bring this action based on a dispute regarding a change in "commission payments or other methods of compensation or delivery methods" which it wished to implement. Instead, Plaintiff filed this action seeking damages resulting from Local 550's strike. Second, Plaintiff does not make a claim under Article XXII. Plaintiff's claim is a Section 303 claim for damages.

Interstate Brands, 1998 WL 19974 at *5. In other words, IBC's argument confuses its dispute over the damages caused by the Union's allegedly illegal strike with the underlying dispute that caused the strike. These disputes are distinct, not one and the same.

For these reasons, IBC's LMRA § 303 claim is not excluded from arbitration under Article XXII of the Agreement.

C. The Effect of Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Local 584.

IBC also argues that its LMRA § 303 claim is not arbitrable under this court's decision over three decades ago

in Old Dutch, 359 F.2d 598. The "principal issue", id. at 600, in Old Dutch was whether an employer's LMRA § 303 claim against a union was arbitrable pursuant to an arbitration clause that read as follows:

> [A]ny and all disputes and controversies arising under or in connection with the terms and provisions of this agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein, expressly provided but germane to the subject matter of this agreement * * * shall be submitted for arbitration to anarbitrat or * * * (emphasis supplied)

Id. The court in Old Dutch held that (1) the arbitration clause did not commit to arbitration disputes unrelated to the application and interpretation of particular provisions of the collective bargaining agreement; and (2) LMRA § 303 claims were not germane to the subject matter of the agreement. See id. at 601. Accordingly, the court concluded that "[s]ince nothing in the record or collective agreement . . . provide[d] a basis for finding that the employer and the union agreed to submit the employer's damage claim to an arbitrator," id. at 604, the employer's LMRA § 303 claim was not arbitrable. Old Dutch, however, is distinguishable from the present case because, as previously explained, Article VI of the Agreement is not as limited as its counterpart in Old Dutch. Article VI commits to arbitration "any act or conduct or relation between the parties hereto, directly or indirectly," even if not germane to the subject

matter of the Agreement. IBC's reliance on Old Dutch is thus misplaced.

IBC also relies on Old Dutch's assertion that "absent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine the validity of tort damage claims by one party against another, it must be assumed that the employer did not intend to forego his rights under Section 303." Id. at 603. For two reasons, we decline to follow this language. First, since Old Dutch was decided the Supreme Court has repeatedly held that a party to a contract who has a federal statutory claim may be limited to an arbitral forum even though the agreement requiring arbitration of that claim did not contain "a clear, explicit statement" to that effect. See, e.g, Gilmer, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26; Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Second, following the language of Old Dutch would, in effect, conflict with a key aspect of the holding in Wright. As already noted, the Court there stressed that plaintiff Wright had not individually waived his right to a judicial forum for his statutory claim; his union had negotiated that. In this case, however, IBC itself negotiated away its right. Under the circumstances, we think it inappropriate to extend to an individual employer like IBC Wright's requirement that waiver of a judicial forum for statutory claims must be "clear and unmistakable."

Accordingly, we conclude that IBC's LMRA § 303 claim may be arbitrated despite the absence of a clear, explicit statement to that effect.

Appendix A

D. Genuine Issues of Material Fact

Finally, IBC contends that summary judgment was improper in light of assertions made by Volpe to members of the Union and IBC that the Union's objection to IBC's use of the Jacobson companies was not subject to arbitration under the Agreement. According to IBC, these statements create a genuine issue of material fact as to the arbitrability of its LMRA § 303 claim. We disagree. Like the contention that IBC's statutory claim comes within Article XXII's exclusion of certain distribution disputes from arbitration, this argument confuses IBC's dispute over the damages that resulted from the allegedly illegal strike with the underlying dispute that caused the strike. Whether or not Volpe considered the Union's distribution dispute to be arbitrable is irrelevant to the arbitrability of IBC's LMRA § 303 claim based on damages caused by the Union's allegedly unlawful secondary activity.

Conclusion

We conclude that the parties' collective bargaining agreement requires that IBC's LMRA § 303 claim be arbitrated, and we affirm the judgment of the district court.

Appendix A

ATTACHMENT

Appendix

ARTICLE XXII — REVIEW OF DISTRIBUTION POLICIES:

(A) The Union and Employer recognize the changes that have occurred in retail food stores, i.e. the rapid disappearance of small individual stores and their replacement at an accelerated rate by the large corporate and cooperative food chains. Accordingly, it may be necessary to recognize the appropriateness of considering changes in delivery, merchandising and compensation methods. In view of this, the Employer covered by this Agreement may at any time during the life of the Agreement request a meeting with the Union for the purpose of negotiating and mutually agreeing on different commission payments or other methods of compensation or delivery methods which may be desirable under such changed conditions.

In the event of such request, the parties will meet promptly for the purposes outlined above.

(B) In the event the parties are unable to agree, the dispute shall not be subject to arbitration.

(C) Other provisions of the contract notwithstanding, the parties recognize that the employer may decide to change its distribution methods during the term of this agreement only. Accordingly, it is understood that the employer has

the right to reopen the contract during the contract term for the sole purpose of negotiating the effects of such changed distribution. In such reopener, the parties will meet and bargain in good faith to resolve differences, if any. If the parties fail to reach agreement and the employer implements such distribution changes the Union shall have the right to strike and the employer shall have the right to lock out over the distribution change issues.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JANUARY 20, 1998

INTERSTATE BRANDS CORPORATION,
Plaintiff,

v.

BAKERY DRIVERS & BAKERY GOODS VENDING MACHINES, LOCAL UNION NO. 550,
International Brotherhood of Teamsters,
Defendant.

No. 96 CV 4454(SJ).

United States District Court, E.D. New York.

Jan. 20, 1998.

* * *

MEMORANDUM AND ORDER

JOHNSON, J.

The plaintiff filed the present action pursuant to Section 303 of the Labor Management Relations Act, as amended (the "LMRA"), 29 U.S.C. § 187, to recover damages from the defendant's strike, an alleged illegal secondary boycott in violation of Sections 8(b)(4)(i)-(ii)(B) and 8(b)(4)(i)-(ii)(D) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. §§ 158(b)(4)(i)-(ii)(B) and 158(b)(4)(i)-(ii)(d).

Appendix B

The defendant has moved for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. For the reasons set forth herein, the defendant's motion for summary judgment is granted.

STATEMENT OF FACTS

For the purposes of this summary judgment motion, the defendant does not dispute the facts alleged by the plaintiff in its amended complaint (the "Complaint"). The defendant relies upon the language of the collective bargaining agreement between the parties to support its motion.

I. The Collective Bargaining Agreement

Interstate Brands Corporation ("Plaintiff") is a nationwide producer and distributor of cake products. Complaint ¶ 3. In 1995, Plaintiff acquired the Continental Baking Company ("CBC") by merger. Id. Prior to the merger, on February 7, 1995, Local Union No. 550 ("Local 550" or "Defendant") entered into a collective bargaining agreement for the period from March 6, 1994 through March 8, 1997 (the "Agreement") with CBC. Id. at ¶ 5. Since Plaintiff's acquisition of CBC, Plaintiff has assumed the terms and conditions of the Agreement, including its arbitration provisions. Id. The Agreement controls the present dispute.

Under Article VI of the Agreement, disputes between the parties are governed by a broad arbitration clause. (Declaration of Richard J. Volpe "Volpe Decl." Ex. A at

p. 3-4). Article VI(A) states, "The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this Agreement or any act or conduct or relation between the parties hereto directly or indirectly." Id. If the parties cannot resolve the disputes through the procedures set forth in the Agreement, then either party has the right to refer the matter to arbitration. Id. at 4.

In addition to the broad arbitration clause, the Agreement expressly excludes certain disputes from arbitration. In particular, disputes under Article VIII(A) and (D) and Article XXII[1] are not subject to the arbitration

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1. Article XXII reads as follows:

ARTICLE XXII — REVIEW OF DISTRIBUTION POLICIES:

(A) The Union and Employer recognize the changes that have occurred in retail food stores, i.e. the rapid disappearance of small individual stores and their replacement at an accelerated rate by the large corporate and cooperative food chains. Accordingly, it may be necessary to recognize the appropriateness of considering changes in delivery, merchandising and compensation methods. In view of this, the Employer covered by this Agreement may at any time during the life of the Agreement request a meeting with the Union for the purpose of negotiating and mutually agreeing on different commission payments or other methods of compensation or delivery methods which may be desirable under such changed conditions.

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provision of the Agreement. Id. at 4-5, 13-14. Pursuant to Article XXII(B), where the parties are unable to agree on proposed changes in distribution policies, the dispute is not arbitrable. Id. at 14. Furthermore, Article XXII(C) permits Local 550 to strike over disputes concerning distribution policies under certain circumstances. Id. In addition, Plaintiff may lock out employees over these disputes. Id. Local 550 has never taken part in an arbitration under Article XXII with Plaintiff or other employers under analogous provisions of labor contracts. (Affidavit of William P. Harrington "Harrington Aff." Ex. A at 80-82).

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> In the event of such request, the parties will meet promptly for the purposes outlined above.
>
> (B) In the event the parties are unable to agree, the dispute shall not be subject to arbitration.
>
> (C) Other provisions of the contract notwithstanding, the parties recognize that the employer may decide to change its distribution methods during the term of this agreement only. Accordingly, it is understood that the employer has the right to reopen the contract during the contract term for the sole purpose of negotiating the effects of such changed distribution. In such reopener, the parties will meet and bargain in good faith to resolve differences, if any. If the parties fail to reach agreement and the employer implements such distribution changes the Union shall have the right to strike and the employer shall have the right to lock out over the distribution change issues.

Appendix B

II. The Strike

Plaintiff had produced Dolly Madison cake products for many years prior to its acquisition of CBC. Complaint ¶ 6. The Dolly Madison cake products have been distributed in the New York metropolitan area by three companies owned by Mr. Sam Jacobson (the "Jacobson Companies") Id. Plaintiff also produces Hostess cake products which are transported, distributed and sold by Local 550 members in the New York area. Id. at ¶¶ 11-13. Neither Local 550 nor its members have ever handled, transported, distributed or otherwise dealt with Dolly Madison cake products. Id. at ¶ 14.

Beginning in July 1995, Local 550 demanded that Plaintiff cease the distribution of Dolly Madison cake products in the New York area through the Jacobson Companies. Id. at ¶¶ 15-16. Local 550 claimed that such distribution violated the terms of the Agreement. Id. In a letter dated August 25, 1995, Richard Volpe ("Volpe"), Executive Officer of Local 550, issued a strike notice to Jim Forbes, General Manager of Plaintiff's Jamaica Facility, stating that Plaintiff was in violation of Article XXII(C) for its distribution of Dolly Madison cake products. (Harrington Aff. Ex. D). Another strike notice was issued by Volpe in a letter dated February 28, 1996. (Harrington Aff. Ex. E). The strike was to be effective 12:01 p.m. on March 3, 1996. Id. Volpe stated, in a memorandum to Local 550 members dated March 4, 1996, that he did not consider the dispute to be arbitrable. (Harrington Aff.Ex. F).

On September 9, 1996, Local 550 commenced a strike against Plaintiff pursuant to Article XXII of the Agreement,

reasoning that Plaintiff violated the Agreement by failing to distribute Dolly Madison cake products through Local 550 employees and/or paying commissions to Local 550 employees for the Dolly Madison cake products distributed by the Jacobson Companies. Complaint ¶¶ 17, 22. Local 550's strike objective was to force Plaintiff to cease distribution of Dolly Madison cake products through the Jacobson Companies and to force Plaintiff to assign that work to Local 550 members. Id. at ¶¶ 17-18.

Plaintiff filed an unfair labor practice charge with the National Labor Relations Board (the "NLRB") against Local 550 alleging secondary boycott violations of Sections 8(b)(4)(i)-(ii)(B) and 8(b)(4)(i)-(ii)(D) of the NLRA on September 9, 1996. Id. at ¶ 19. Shortly thereafter, Local 550 entered into a settlement agreement with the NLRB. Pursuant to this settlement, Local 550 agreed to end the strike. Id. instead, Local 550 expanded the strike causing Plaintiff to suffer further damages with regard to the sale of its products. Id. at ¶ 22.

Plaintiff filed the present action pursuant to Section 303 of the LMRA to recover damages from Local 550's strike.[2]

DISCUSSION

Defendant brings the present summary judgment motion because it contends that Plaintiff has initiated this

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2. Section 303 establishes jurisdiction of the district courts over suits for da.nages resulting from Section 8(b)(4) of the NLRA. Section 8(b)(4) prohibits a union or its agents from engaging in certain unfair labor practices as defined in that section.

action in the wrong forum. According to Defendant, Plaintiff's claim is subject to arbitration under the broad arbitration clause of the Agreement. Thus, Plaintiff is required to bring this action as an arbitration. As a result, Defendant states that its summary judgment motion should be granted and the Complaint should be dismissed.

Plaintiff, on the other hand, states that summary judgment is inappropriate in this case for a number of reasons. First, Plaintiff states that its claim is not arbitrable under the provisions of the Agreement. Second, Plaintiff contends that Section 303 claims are not arbitrable generally, as a matter of law and policy. Finally, Plaintiff argues that there are genuine issues of material fact in dispute thereby making a summary judgment award improper.

I. Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The court's function is not to resolve disputed issues of fact, but only to determine whether there is a genuine issue to be tried. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Eastman Mach. Co. v. United States, 841 F.2d 469, 473 (2d Cir.1988). In making this determination, the court is required to view the evidence in the light most favorable to the nonmoving party. See Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 547, 586-87 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Furthermore, the party seeking summary judgment has the burden of showing that no genuine factual dispute exists. See Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 202 (2d Cir.1995).

Once the movant has come forward with appropriate support demonstrating that there is no genuine issue of material fact to be tried, the burden shifts to the nonmoving party to present similar support setting forth specific facts about which a genuine triable issue remains. See Anderson, 477 U.S. at 250. Mere conclusory allegations will not suffice. Instead, the nonmoving party must, by deposition, interrogatory answers, or other documentation allowed under the rule, adduce "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). See also Barnett v. Howaldt, 757 F.2d 23, 26 (2d Cir.1985).

II. Arbitrability of Plaintiff's Claim

The threshold issue before this Court is whether Plaintiff's claim is subject to arbitration under the Agreement. The question of whether a dispute is arbitrable is one for the court to decide based on language of the contract. See AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).[3] It is well settled that a party

3. This case is one of the three landmark Supreme Court cases which set forth the principles which govern the arbitrability of labor

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cannot be required to arbitrate a dispute which it did not agree to arbitrate. See AT & T Technologies, 475 U.S. at 648. Additionally, in determining whether the parties agreed to submit a particular dispute to arbitration, a court may not rule on the potential merits of the underlying claims. Id. at 649.

Furthermore, where a labor agreement contains an arbitration clause, there is a presumption of arbitrability for the disputes between the parties to the agreement. Id. at 650. Where the arbitration clause is especially broad, such a presumption is particularly applicable. Id. This presumption of arbitrability furthers the strong national policy favoring arbitration of labor disputes. Id. at 650-51; Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. at 578-80.

In this case, the Court concludes that the broad arbitration clause as set forth in Article VI of the Agreement does cover Plaintiff's claim. As stated above, pursuant to Article VI, all complaints, disputes or grievances arising between the parties involving questions of interpretation or application of any clause or matter covered by the Agreement or any act or conduct or relation between the parties, either directly or indirectly are subject to arbitration. Indeed, Plaintiff's claim is a "dispute" "arising between"

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disputes. These cases are commonly referenced as the Steelworkers' Trilogy. The other cases composing the trilogy are United Steelworkers of America v. American Mfg. Co., 363 U.S. 563 (1960) and United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

Plaintiff and Local 550 involving "conduct" "between the parties." The conduct in dispute is Local 550's strike and the resulting damages therefrom. Thus, this Court finds that the claim falls within the purview of the Agreement's arbitration clause. See Associated Brick Mason Contractors of Greater New York, Inc. v. Harrington, 820 F.2d 31, 35-36 (2d Cir.1987) (construing similar arbitration clause broadly to include grievance).

A. Article XXII exception

Nevertheless, Plaintiff argues that although its claim may fall within the scope of the arbitration clause, the claim is expressly excluded from arbitration by Article XXII(B) of the Agreement. It is well settled that where claims are to be excluded from arbitration, it must be clearly and unambiguously stated in the agreement. See International Union of Elec., Radio and Mach. Workers v. General Elec. Co., 407 F.2d 253, 263 (2d Cir.1968), cert. denied, 395 U.S. 904 (1969). Furthermore, "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. at 582-83. Moreover, in the absence of an express provision excluding a dispute from arbitration under an agreement "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Id. at 585.

As a general matter, Article XXII deals with changes in distribution policies and the actions the parties may take

if disputes arise regarding the changes. Under Article XXII(B), where the parties are unable to agree on "different commission payments or other methods of compensation or delivery methods" which become desirable due to changes in the retail food store industry, the dispute is not subject to arbitration. This Court interprets Article XXII(B) as creating a narrow exception to the otherwise broad arbitration provisions of the Agreement.

Here, Plaintiff's claim is not the type of dispute contemplated in Article XXII(B). First and foremost, Plaintiff's claim is not directly related to a change in distribution policies. Plaintiff did not bring this action based on a dispute regarding a change in "commission payments or other methods of compensation or delivery methods" which it wished to implement. Instead, Plaintiff filed this action seeking damages resulting from Local 550's strike. Second, Plaintiff does not make a claim under Article XXII. Plaintiff's claim is a Section 303 claim for damages. Although the claim is related to Article XXII, it is attenuated from a dispute under Article XXII. Thus, since Plaintiff's claim does not fall within the narrow scope of Article XXII(B), the exception set forth therein is inapplicable to the present action.

Plaintiff contends that its claim falls under the exception to arbitration because it follows from Local 550's strike. According to Plaintiff, since Local 550's strike was called pursuant to Article XXII, Plaintiff's claim for damages resulting from the strike concern Local 550's Article XXII conduct. As a result, Plaintiff argues that the strike and all aspects of the strike including its damage claim necessarily

fall within the distribution policy disputes excluded from arbitration under Article XXII(B). The Court disagrees with this contention.

Plaintiff asks this Court to read the Article XXII(B) exception broadly where the language of the Agreement does not so dictate. While Local 550's right to strike under Article XXII is expressly exempted from arbitration,[4] nowhere in Article XXII does this Court find a clear and unambiguous exemption for Section 303 claims or more generally for any claims resulting from strikes called under that article. The parties demonstrated in the arbitration provisions of Article VI that when they intended a clause to have a broad scope the contract language so indicated. No such expansive and broad language was used in Article XXII(B). Since Plaintiff's claim is not clearly and unambiguously excluded from the arbitration provisions of the Agreement, this Court declines to interpret the Article XXII(B) exception to include Plaintiff's claim.

B. Arbitration of Statutory Claims

The fact that Plaintiff's claim is a statutory claim does not lead this Court to a different result. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., the Supreme Court stated that there was no general presumption against the arbitration of statutory claims. 473 U.S. 614, 625, 105 S.Ct.

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4. This Court makes no finding as to whether Local 550's strike was properly called pursuant to Article XXII(C). See AT & T Technologies, 475 U.S. at 649. Nonetheless, that issue has no bearing on the determination of the issue presently before this Court.

3346, 87 L.Ed.2d 444 (1985). "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Id. at 628. However, the Supreme Court added that all controversies implicating statutory rights are not necessarily suitable for arbitration. Id. at 627.

Thus, when determining the arbitrability of a statutory claim, in addition to determining whether the claim falls within the scope of the agreement, the court must decide whether Congress intended the statutory claim to be non-arbitrable. See Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844 (2d Cir.1987). In order for a statutory claim to override the strong federal policy favoring arbitration, the party opposing arbitration has the burden of showing through the statute's text or legislative history that Congress intended to preclude a waiver of judicial remedies for the statutory claim at issue. See Shearson American Express, Inc. v. McMahon, 482 U.S. 220, 227, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). Congress' intent to remove a particular claim from arbitration may also be deduced "from an inherent conflict between arbitration and the statute's underlying purposes." Id.

Plaintiff has not met its burden of demonstrating that Congress intended claims pursuant to Section 303 of the LMRA to be non-arbitrable. There is no evidence before this Court indicating a congressional intent to preclude these claims from arbitration. Furthermore, this Court's review of the legislative history of Section 303 did not reveal any evidence of an intent to prevent the arbitration of these

claims, particularly where the scope of the arbitration clause covers the claims. Moreover, there is no indication that the judicial remedy provided under Section 303 was meant to be exclusive. Therefore, the Court cannot rule that Congress intended Section 303 claims to be non-arbitrable. See Farmland Dairies. Inc. v. Milk Drivers & Dairy Employees Union Local 680, 956 F.Supp. 1190, 1202 (D.N.J.1997) (holding that Section 303 claims are arbitrable). The Court also does not find an inherent conflict between arbitration and the underlying purposes of Section 303 of the LMRA.

In support of its argument to the contrary, Plaintiff cites the Second Circuit's decision in Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Local Union No. 584, 359 F.2d 598 (2d Cir.), cert. denied, 385 U.S. 832, 87 S.Ct. 71, 17 L.Ed.2d 67 (1966). In Old Dutch Farms, the court found that an employer's Section 303 claim was not precluded by the arbitration clause of the parties' collective bargaining agreement.[5] 359 F.2d 598. The court reasoned that the claim bore "no meaningful connection with the terms, conditions or subject matter" of the agreement. Id. at 601. Thus, since nothing in the arbitration clause involved in that case committed disputes which were "unrelated to the interpretation of particular provisions of the collective agreement or to the subject matter of the agreement" to

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5. The arbitration clause provided that "any and all disputes and controversies arising under or in connection with the terms and provisions of [the] agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions [thereof], or in respect to anything not [therein], expressly provided but germane to the subject matter of [the] agreement . . . shall be submitted for arbitration to an arbitrator. . . ." Id. at 600.

arbitration, the court held that the employer's Section 303 claim was not arbitrable. Id.

The court articulated other reasons for declining to subject the employer's Section 303 claim to arbitration in Old Dutch Farms. While acknowledging the strong federal policy favoring arbitration of labor disputes in cases under Section 301(a) of the LMRA, the court distinguished Section 301 claims from Section 303 claims. Section 301((a) authorizes lawsuits for the violation of collective bargaining agreements. Such suits require an arbitrator to interpret and apply the terms of the collective bargaining agreements. According to the court, "[t]he interpretation and application of the terms of a collective bargaining agreement is a function that traditionally has been considered to be within the peculiar province of labor arbitrators." Id. at 602. Thus, when parties insert a broad arbitration clause in their collective bargaining agreement it is reasonable to presume that the parties intended all disputes which require performance of that function to be decided in arbitration absent the express exclusion of a particular claim. Id.

However, the court reasoned that Section 303 claims concern matters which have traditionally been determined by courts and to which the expertise of labor arbitrators may not extend. Id. Therefore, the same reasoning does not apply with equal force. Id. The court found no special reason to presume that parties to a collective bargaining agreement desire to submit Section 303 claims to arbitration.[6] Id. at

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6. This lead the court to conclude that "absent a clear, explicit statement in the collective bargaining contract directing an (Cont'd)

603. The court added that the suit before it did not raise "any question of contract interpretation which can be characterized as particularly suited for arbitration." Id. Instead, the validity of the employer's claim, a tort claim for damages, involved issues which were particularly suited for adjudication by a court. Id. at 604.

Nevertheless, Old Dutch Farms is distinguishable from the present case. First and foremost, the arbitration clause in the Agreement is broader than the arbitration clause analyzed in Old Dutch Farms. In this case, the Court has concluded that Plaintiff's Section 303 claim is embraced by the broad arbitration clause of the Agreement. On the other hand, as discussed more fully above, the court in Old Dutch Farms found that the arbitration provision of the parties' collective bargaining agreement did not include the employer's Section 303 claim. The court determined that the statutory claim was wholly independent of the collective bargaining agreement. Although the arbitration provision in Old Dutch Farms was broad, it was narrower than the

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(Cont'd)
arbitrator to hear and determine the validity of tort damage claims . . . it must be assumed that the employer did not intend to forgo his rights under Section 303 and that the parties did not intend to withdraw such disputes from judicial scrutiny." Id. at 603. However, that statement contradicts longstanding Supreme Court precedent which states that exceptions to the arbitration clauses must be clearly carved out of the agreement and any doubts regarding the scope of clause should be resolved in favor of coverage. See Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. at 582-83; AT & T Technologies, 475 U.S. at 650; Associated Brick Mason Contractors, 820 F.2d at 35.

arbitration clause at issue in this cause. Therefore, the Old Dutch Farms decision is not dispositive here.[7]

Furthermore, in light of the decisions rendered by the Supreme Court and the Second Circuit since the Old Dutch Farms decision, this Court is persuaded that Section 303 claims are in fact arbitrable. In Mitsubishi Motors Corp., the Supreme Court expressed. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited arbitration as an alternative means of dispute resolution." 473 U.S. at 626-27. The Supreme Court has put to rest "the old judicial hostility to arbitration." Rodriguez De Quijas v. Shearson American Express, Inc., 490 U.S. 477, 480, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

As a result, the Supreme Court has found in a number of cases that certain statutory claims, previously thought to be non-arbitrable, could in fact be arbitrated. See Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (finding that claim under the Age Discrimination in Employment Act was subject to arbitration); Rodriguez De Quijas, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (holding that securities fraud claims arising under Section 12(2) of the Securities Act of 1933 are arbitrable); McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (ruling that claim under Section 10(b) of

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7. Additionally, as discussed more fully, infra, recent precedent from both the Supreme Court and the Second Circuit casts doubt on the continued vitality of the reasoning underpinning the Old Dutch Farms decision.

the Securities Exchange Act of 1934 and civil RICO claim were arbitrable); Mitsubishi Motors Corp., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (finding that antitrust dispute arising under the Sherman Act may be subject to arbitration). These cases illuminate the Supreme Court's gradual trend toward acceptance of arbitration as a permissible forum for a wide variety of statutory claims where the contracts between the parties indicate that the parties have so agreed.

Indeed, Second Circuit case law reveals a similar trend of acceptance of arbitration. See Collins & Aikman Products Co. v. Building Systems, Inc., 58 F.3d 16 (2d Cir.1995) (upholding district court's decision compelling claim for wrongful termination to arbitration and stating that other tort claims were arbitrable); Bird v. Shearson Lehman/ American Express, Inc., 926 F.2d 116 (2d Cir.) (finding ERISA claims to be arbitrable), cert. denied, 501 U.S. 1251, 111 S.Ct. 2891, 115 L.Ed.2d 1056 (1991); Associated Brick Mason Contractors, 820 F.2d 31 (holding disputes between union and employer arbitrable); Genesco, 815 F.2d 840 (finding RICO claim, claim under Robinson-Patman Price Discrimination Act, fraudulent inducement claim, unfair competition claim and unjust enrichment claim subject to arbitration). See also McNulty v. Prudential-Bache Sec., Inc., 871 F.Supp. 567 (E.D.N.Y.1994) (determining claim pursuant to Jury Systems Improvement Act was subject to arbitration). In these decisions, the Second Circuit has both acknowledged the Supreme Court's liberal policy favoring arbitration and followed its precedent with regard to the arbitrability of statutory claims. In addition, the Second Circuit has recognized that federal policy requires the court

to construe arbitration clauses as broadly as possible. See David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 250 (2d Cir.), cert. dismissed, 501 U.S. 1267, 112 S.Ct. 17, 115 L.Ed.2d 1094 (1991) (citation omitted).

Moreover, since Old Dutch Farms, the Second Circuit has reconsidered its distinction regarding the suitability for arbitration of contract claims versus tort claims. As mentioned above, in Old Dutch Farms, the Second Circuit expressed the view that contractual disputes were particularly suited for arbitration while claims based in tort were particularly suited for judicial resolution and not arbitration. 359 F.2d at 603. Thus, the Section 303 claim, a tort claim, was not arbitrable. However, subsequent decisions by the Second Circuit demonstrate that the court has found that tort claims are arbitrable. See Collins, 58 F.3d 16; Genesco, 815 F.2d 840. In Collins, the court stated, "The mere fact that this is a tort claim, rather than one for breach of the [c]ontracts, does not make the claim any less arbitrable." 58 F.3d at 23. Therefore, the skepticism expressed in Old Dutch Farms concerning the arbitrator's ability to handle tort claims no longer exists.

Due to the greater acceptance of arbitration for a range of claims, particularly tort claims, the Second Circuit's reasoning behind finding the Section 303 claim to be non-arbitrable in Old Dutch Farms (other than the fact that the claim did not fall within the scope of the arbitration clause) has been eroded. Thus, the distinctions between Section 301 and Section 303 claims, as articulated in Old Dutch Farms are no longer viable. The Court finds no reason to presume, as the court presumed in Old Dutch Farms, that a Section

303 claim is not intended by parties to fall under the coverage of a broad arbitration provision of a collective bargaining agreement. Furthermore, the Court is convinced that an arbitrator is capable of assessing and resolving a claim brought under Section 303.

All in all, considering the breadth of precedent holding that statutory claims are arbitrable coupled with the strong federal policy favoring arbitration of labor disputes, this Court finds no reason to conclude that claims pursuant to Section 303 of the LMRA are non-arbitrable. As the court stated in Farmland Dairies, "[I]t is difficult to perceive why claims arising under [Section] 303 of the LMRA should be any less amenable to adjudication in an arbitral forum than claims arising under [Section] 301" or claims arising under any other statute. 956 F.Supp. at 1202. Accordingly, this Court concludes that Plaintiff's Section 303 claim is arbitrable.

Plaintiff has failed to provide any evidence that leads this Court to a contrary result. The other cases cited by Plaintiff in support of its contention that Section 303 claims are not arbitrable are inapposite. Furthermore, Plaintiff's remaining arguments against the arbitration of the Section 303 claim are unpersuasive.

III. No Genuine Issues of Material Fact

Finally, Plaintiff argues that summary judgment is inappropriate in this case because material issues of fact exist as to the correct interpretation of Article XXII. Plaintiff, in essence, raises a disputed issue of law. However,

"[w]here the sole question presented on a motion for summary judgment is the interpretation of a clear and unambiguous written agreement, the issue is one of law for the court and may be decided upon a motion for summary judgment." Jacobsen Shipyard v. Aetna Cas. and Sur.Co., 775 F.Supp. 606, 609 (S.D.N.Y.1991). Therefore, the interpretation of the Agreement is within the sole province of this Court and this Court chooses to decide the issue on summary judgment.

Still, assuming the facts in dispute as stated by Plaintiff are genuine issues of fact, these factual disputes are not material to the determination of the threshold issue before this Court, whether Plaintiff's claim is subject to arbitration. If the moving party is still entitled to judgment as a matter of law even when all the facts alleged by the moving party are taken as true, then the factual disputes however genuine are not material, and their presence will not preclude summary judgment. See Cartier v. Lussier, 955 F.2d 841, 845 (2d Cir.1992). See also Anderson, 477 U.S. at 248.

Here, Defendant does not dispute the facts alleged in the Complaint for the purposes of this motion. Nevertheless, even when construing the facts in the light most favorable to Plaintiff, the Court finds that Defendant is entitled to a judgment as a matter of law. Therefore, the factual disputes are not material and will not preclude summary judgment in this case.

This Court finds that there are no genuine issues of material fact in dispute. As a result, summary judgment is appropriate. See Anderson, 477 U.S. at 250.

Appendix B

CONCLUSION

Based on the foregoing, this Court holds that Plaintiff's claim is subject to arbitration under the broad arbitration clause of the Agreement. Plaintiff's claim is not exempted from arbitration by the exception set forth in Article XXII(B) of the Agreement. This Court also finds that Congress did not intend for Section 303 claims to be non-arbitrable. Thus, Plaintiff's claim should have been brought as an arbitration.

Furthermore, the Court finds that no genuine material issues of fact exist precluding an award of summary judgment in this case. Accordingly, Defendants' motion for summary judgment is granted. The Complaint is hereby dismissed.

SO ORDERED.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 18, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES DISTRICT COURT
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of March one thousand nine hundred and ninety-nine.

Present:

Hon. Wilfred Feinberg

Hon. Ellsworth VanGraafeiland

Hon. Pierre N. Leval

Circuit Judges

Appendix C

Docket No. 98-7194

Interstate Brands

Plaintiff-Appellant,

v.

Bakery Drivers

Defendant-Appellee.

A petition for panel rehearing having been filed herein by Interstate Brands Corporation

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
CAROLYN CLARK CAMPBELL,
Clerk

By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX D — RELEVANT STATUTES

29 U.S.C. § 158

§ 158. Unfair labor practices.

* * *

(b) Unfair labor practices by labor organization.

It shall be an unfair labor practice for a labor organization or its agents —

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade,

craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such

publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * *

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, an any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person

engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

* * *

29 U.S.C. § 173

§ 173. Functions of Service

* * *

(d) Use of conciliation and mediation services as last resort

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * *

Appendix D

29 U.S.C. § 187

§ 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

* * * *

29 U.S.C. § 160

§ 160(k). Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which

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1. So in original. Probably should read "of".

such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.